No. 16246

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of

GAETAINO DIANO, on Habeas Corpus,

Appellant.

APPELLEE'S BRIEF.

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Jurisdiction.

The District Court had jurisdiction to review the final order of deportation made pursuant to Section 241(a)(2) and (9) of the Immigration and Nationality Act of 1952, Title 8 U. S. C. Sections 1251(a)(2) and (9), by virtue of Congressional authorization contained in Title 5, U. S. C. Section 1009; Title 8, U. S. C. Sections 1251 and 1329, and Title 28, U. S. C. Sections 2201 *et seq.*

This Court has jurisdiction to review the judgment upholding the deportation order by virtue of the authorization contained in Title 28, U. S. C. Sections 1291 and 1294(1).

Statutes and Regulations Involved.

Section 241(a)(2) and (9) of the Immigration and Nationality Act of 1952 (8 U. S. C. 1953 Ed., 1251(a)(2) and (9)) provide:

> §241 Deportable Aliens—General classes
>
> (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> * * *
>
> (2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this chapter or in violation of any other law of the United States;
>
> * * *
>
> (9) was admitted as a nonimmigrant and failed to maintain the nonimmigrant status in which he was admitted or to which it was changed pursuant to section 1258 of this title, or to comply with the conditions of any such status; . . .

Section 101(a)(15)(D) of the Immigration and Nationality Act of 1925 (8 U. S. C., 1953 Ed., 1101(a)(15D)) provides:

> §101 Definitions
>
> (a) As used in this chapter—
>
> (15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens—
>
> * * *
>
> (D) an alien crewman serving in good faith as such in any capacity required for normal operation and service on board a vessel (other than a fishing

vessel having its home port or an operating base in the United States) or aircraft, who intends to land temporarily and solely in pursuit of his calling as a crewman and to depart from the United States with the vessel or aircraft on which he arrived or some other vessel or aircraft; . . .

Statement of the Case.

The facts of this case are not in dispute. Appellant is an alien, a native, and a citizen of Italy. He last entered the United States at the Port of New York, New York, on January 13, 1957 as a "nonimmigrant" crew-member of the "Ragunda." In accordance with the regulations of the Immigration Service he was authorized by the examining immigration officer to land temporarily for the period that the ship was in the United States "not exceeding twenty-nine days in the aggregate," 8 C. F. R. 252.1(d). Contrary to these conditions appellant failed to depart with the "Ragunda" and has remained in the United States. The twenty-nine-day period expired February 11, 1957.

On July 28, 1958, deportation proceedings were duly instituted. Appellant was arrested pursuant to a valid immigration warrant. He was formally notified that he would be held in custody until the conclusion of a hearing held to determine his deportability. Appellant was told that he could appeal this custody-order, but he did not choose to do so. He was charged with violating Section 241(a)(2) and (9) of the Immigration and Nationality Act of 1952, 8 U. S. C. 1251(a)(2) and (9) for the reason that after being temporarily admitted as a "nonimmigrant" as defined by Section 101(a)(15)(D), 8 U.

S. C., Section 1101(a)(15)(D), he failed to comply with the conditions in his permit to enter by remaining in the United States for a longer time than allowed.

Pursuant to Section 242 of the Immigration and Nationality Act (8 U. S. C. Sec. 1252(b)) and the applicable regulations (8 C. F. R. 242.16) appellant was granted a hearing to show cause why he should not be deported. Following appellant's admission of the charges contained in the order to show cause, the Special Inquiry Officer entered his decision that appellant was deportable as authorized by the regulations, 8 C. F. R. 242.16(b). The Officer informed appellant of his right to appeal from the decision, but appellant declined to do so.

On August 4, 1958 an application for Writ of Habeas Corpus was filed in appellant's behalf. The application contained a prayer asking the court to admit appellant to bail. That same day the District Court issued an order to show cause why the writ should not issue, and on August 8, 1958 the government filed its return in opposition. On August 12, 1958 the District Court held that the appellant was deportable and not entitled to bail.

The appeal from the judgment below, filed on September 2, 1958, alleges a violation of due process on two grounds. First, appellant contends that the proceedings by which he was found deportable offended due process because of the speed with which they were completed. Second, he claims that the District Court's denial of bail contravenes the requirements of due process.

VALIDITY OF THE DEPORTATION ORDER.

I.

Appellant's Hearing Before the Immigration and Naturalization Service Afforded All the Protections Guaranteed Him by the Due Process Clause.

Appellant contends that the mandates of due process have been violated in that the proceedings to determine his deportability took no longer than twenty-four hours. However, fairness accorded rather than time consumed constitutes the criteria for due process.

> ". . . with respect to due process [an alien] is entitled to procedural due process, that is, that he be given notice of the hearing and an opportunity to show that he does not come within the classification of aliens whose deportation Congress has directed." *United States ex rel. Harisiades v. Shaughnessy,* 187 F. 2d 137 (2d Cir., 1951), aff. 342 U. S. 580, reh. den. 343 U. S. 936.

Not one facet of appellant's hearing was tainted with unfairness. Pursuant to Congressional authorization, Section 242 of the Immigration and Nationality Act of 1952, 8 U. S. C. Section 1252(b), a Special Inquiry Officer took charge of the proceeding. He fastidiously adhered to the rules and regulations applicable to Section 242 of the Act. An interpreter was present throughout. The entire hearing was conducted in Italian, appellant's native tongue. The Officer explained at the outset that the purpose of the hearing was to determine appellant's right to be and to remain in the United States and to give him an opportunity to show cause why he should not be deported. After every explanation, the Officer paused to ask appellant whether he understood. In each instance appellant answered in the affirmative. The Officer in-

formed appellant of his right to counsel and inquired whether he had retained such assistance. Receiving a negative reply, he inquired whether appellant was willing to continue without such representation. Appellant stated that he was. The Officer advised appellant of his right to examine the evidence against him, to submit evidence in his own behalf, and to cross-examine any witnesses who might be presented by the Government. Appellant did in fact examine the order to show cause and notice of hearing and stated that the signatures thereon were his own.

The Officer asked appellant after he was sworn whether he understood that he had stayed in this country longer than permitted by the law. Appellant replied that he understood that he had done so and that he had left the ship with the intention of so doing. Pursuant to the authority contained in Regulation 242.16(b) (8 C. F. R., 1958 rev.) the Officer told appellant that on the basis of the allegations in the order to show cause and appellant's testimony, he was entering decision ordering deportation. Immediately the Officer explained to appellant that he had the right to appeal from this decision. When asked whether he wished to appeal, appellant replied that he did not.

Appellant contends that the proceedings were unreasonably short, but he has given the Court no grounds for concluding that he could have made use of lengthier proceedings. Nor has he ever disputed the result reached. His only objection is with the dispatch with which it was reached.

It may be noted that courts are empowered to review determinations by the Attorney General regarding detention, bail and parole pending final determination of deportability where "the Attorney General is not proceeding

with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability." (Section 242 of the Immigration and Nationality Act of 1952, 8 U. S. C. 1252(a).) Further, it may be noted that there was but one simple fact issue in this case.

II.

Since No Prejudice Resulted to Appellant From the Speed of the Proceeding, Even if Such Were Considered Error, It Must Be Deemed Harmless.

Even assuming for the purpose of argument that the speed of the proceeding constituted error, appellant can show no prejudice resulting therefrom. Accordingly, the error, if any, must be disregarded. The standard of fairness required for deportation proceedings is not violated by defects save where they lead to a denial of justice. See *Application of Orlando,* 131 Fed. Supp. 485 (N. D. N. Y. 1954), aff. 222 F. 2d 537 (2d Cir., 1955), cert. den. 350 U. S. 862; *Marcello v. Ahrens,* 212 F. 2d 830, 837 (5th Cir., 1954), 348 U. S. 805, reh. den. 350 U. S. 856.

Appellant admits entry into the United States contrary to law. The fact content of his admission constitutes grounds for deportation. Moreover, the admission taken alone, without corroboration, is sufficient to sustain the deportation order, for in deportation proceedings the alien's own admissions constitute substantial evidence. *Goncalves Rosa v. Shaughnessy,* 157 Fed. Supp. 907 (S. D. N. Y., 1957).

In *Sumio Madokoro v. Del Guerio,* 160 Fed. 164 (9th Cir., 1947), cert. den. 332 U. S. 764, this Court was presented with a similar fact situation. In that case the appellant, a Japanese, contended that he had been denied due process during his deportation hearing because the offer of

counsel by the Service was meaningless since there were none in the vicinity. This Court did not reach the question of whether due process had been denied with respect to the privilege of counsel. It stated:

> "We think it unnecessary to determine whether there was here a denial of due process, for all the facts elicited from the appellant at the Fort Lincoln hearing relative to the deportation of such alien are admitted to be true. Failure to have counsel, if error, like other errors may not be prejudicial. If there be a presumption that the denial of due process is presumed prejudicial, that presumption is overcome by appellant's admissions here."
>
> 160 F. 2d 164, 167.

See also *Cauto v. Shaughnessy,* 218 F. 2d 758, 760 (2d Cir., 1955), cert. den. 349 U. S. 952; *Alesi v. Cornell,* 250 F. 2d 877 (9th Cir., 1957); *Del Bernardo v. Rogers,* 254 F. 2d 81, 82 (C. A. D. C. 1958).

III.

The Immigration and Naturalization Service Complied With All Regulations Governing Deportation Proceeedings.

Appellant seems to contend in his first point that the Service violated not only the due process clause of the Constitution but also the Regulations applicable and enacted pursuant to the authorization contained in Section 242 of the Immigration and Nationality Act of 1952 (8 U. S. C. Sec. 1252(b)) under which appellant was found deportable. On page four of his brief appellant quotes from the 1952 edition of volume eight of the Code of Federal Regulations, Section 242.51. The 1952 edition has been replaced, however, by an edition published January 1, 1958 which includes all rules and regulations pub-

lished in the Federal Register on or before December 31, 1957. The Regulations were republished in their entirety "because of the numerous amendments which have been made in Title 8, Chapter I of the Code of Federal Regulations." (22 F. R. 9705, Dec. 6, 1957.) Section 242.50 quoted by appellant has been deleted in the revised edition.

The Government refers the Court to the current Regulations governing deportation proceedings. (8 C. F. R. (1958 Ed.) 242.1-242.23.) These regulations have been complied with in every respect.

EFFECT OF COURT'S REFUSAL TO GRANT BAIL.

IV.

The District Court Did Not Err in Refusing to Admit Appellant to Bail Pending Its Review of the Deportation Order.

The Application for Writ of Habeas Corpus filed with the District Court contained a prayer that the appellant be admitted to bail. When the court denied the writ, it also refused to fix bail. Now appellant seems to contend that the District Court erred in refusing to admit him to bail for the three-week period between the filing of the above Application on August 4, 1958 and the entry of the judgment denying the Writ of Habeas Corpus on August 25, 1958. Appellant has never requested bail pending review in this Court.

The action of the District Judge in refusing to set bail for appellant was clearly within his discretion. Congress has expressly authorized the Attorney General to determine in his discretion whether or not the alien should be admitted to bail after entry of an order to deport pending its execution. (Section 242 of the Immigration and Nationality Act of 1952, 8 U. S. C. 1252(c).) While courts

may have some power to admit an alien to bail during this period contrary to a decision of the Attorney General, such power may only be exercised where there is a clear and convincing showing that the decision to hold the alien without bond is arbitrary and without reasonable foundation.

Appellant has made no showing that the refusal of bail was arbitrary. Obviously, there was no delay in the proceedings to determine his deportability. Nor was there any delay in effectuating the alien's departure for the Attorney General was prepared to execute the order within eleven days of its entry. Review by the District Court took but three weeks and was completed less than a month after entry of the final order of deportation. Coupled with the dispatch with which these proceedings have been concluded are two inescapable facts: to wit, that appellant has demonstrated already his unreliability by violating the conditions of his landing permit and that his first apprehension took over eighteen months. Under these circumstances no justification exists for admitting appellant to bail.

In *United States ex rel. Fook Tong v. Watkins,* 58 Fed. Supp. 906, 908 (S. D. N. Y., 1944), the alien, a Chinese, admitted illegal entry into the United States but contended that error had been committed in the selection of India as the country to which he was to be sent, China then being embroiled in war, and in the denial of bail after the entry of the deportation order pending its execution.

The Court held that India was a reasonable alternative under the circumstances and denied bail for reasons applicable to the instant case:

> "When we consider the mass of work to be done in each deportation proceeding handled and the number

of such cases in the Department of Justice, it seems manifest that the delay in the present case has not been unduly great; certainly not sufficient to be characterized as unreasonable. Through his illegal entry, the alien has been able to remain in this country two and a half years. Not improbably his release on bail now would result in considerable difficulty in retaking him for the purpose of executing the deportation order.

"Moreover, the alien is not entitled of right to bail. United States v. District Director of Immigration, etc., 2 Cir., 120 F. 2d 762, 765. Whether bail should be allowed is—at least in the first instance—for the determination of the Attorney General. There is no showing that he has sought the Attorney General's authorization of bail nor is there any basis for his suggestion that any one in the Department of Justice has acted unreasonably in denying bail.

"If it be assumed (though I do not so hold) that the court is empowered to pass on the matter, the record discloses no ground whatever for granting bail." 58 Fed. Supp. 906, 908.

V.

The Question of Whether or Not the District Court Erred in Refusing to Grant Bail Is Now Moot.

Appellant's complaint is with the District Court's refusal to admit him to bail for the three-week period pending its review of the deportation order. Even assuming that the court below erred in denying appellant bail, there is no relief that this Court can grant him. When the District Court denied the Writ of Habeas Corpus, the question of whether bail should have been granted pending its decision became moot. Similarly where an appellate court upholds an order to deport, the question of whether the

District Court erred in denying bail pending its review of the order is moot. In *United States ex rel. Belfrage v. Kenton,* 224 F. 2d 803 (2d Cir., 1955), appellant was administratively denied bail pending the deportation hearing but obtained judicial bail on Writ of Habeas Corpus. After the final order of deportation was entered, he was retaken into custody. He sought another Writ of Habeas Corpus challenging both the deportation order and the denial of bail pending review of that order. The district court affirmed both orders and was in turn affirmed by the Court of Appeals for the Second Circuit which stated:

> "As we are of the opinion that the deportation order is valid and ought to be affirmed, whether the denial of bail was erroneous now presents but an academic question which we will pass without discussion." (224 F. 2d 803, 804.)

Conclusion.

It is respectfully submitted that the decision of the District Court, affirming the decision of the Special Inquiry Officer that the appellant is deportable and refusing to admit appellant to bail, be affirmed.

Respectfully submitted,

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